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No. 88-2055

In The
Supreme Court of the United States
October Term, 1988

ANTHONY M. RIZZI,

Petitioner,

v.

BLUE CROSS OF SOUTHERN CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Employee Retirement Income Security Act of 1974 preempt private causes of action under California Insurance Code section 790.03(h) for alleged improper processing of a claim for benefits under an employee benefit plan?

2. Is a health and hospitalization program established and maintained by an employer through the purchase of insurance an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the employer plays an administrative role in the plan, serving as more than a mere conduit for the payment of insurance premiums?

PARTIES TO THE PROCEEDINGS

Respondent Blue Cross of Southern California has changed its name to Blue Cross of California. Blue Cross of California has no parent company, subsidiary, or affiliate.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Blue Cross of Southern California, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the California Court of Appeal, Fourth Appellate District.

OPINION BELOW

The opinion below is adequately set forth in the petition.

STATEMENT OF THE CASE

Rather than correct the numerous factual inaccuracies in petitioner's statement of the case, respondent incorporates by reference the statement of facts in the opinion below. In brief, petitioner's complaint alleges, inter alia, that respondent

violated California Insurance Code section 790.03(h) by denying petitioner's claim for medical benefits under his employer's group health insurance policy. In accordance with established law and this Court's decision in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), the trial court granted summary judgment against petitioner on the ground that his claims were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. section 1001 et seq. The California Court of Appeal, Fourth Appellate District, affirmed the judgment, and the California Supreme Court denied petitioner's petition for review.

REASONS WHY THE PETITION SHOULD BE DENIED

1. *There Is No Conflict Among the Circuits or State Courts Concerning ERISA Preemption.*

This Court set forth the standard for determining ERISA preemption in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), in which the Court established a two-part test to decide whether ERISA preempts state law claims. The first part of the test requires the court to determine whether the state law actually regulates the business of insurance or merely relates to insurance companies. *Id.* at 50-51. The second and "most important[ ]" part of the test examines the remedies permitted under state law to determine whether they supplement or supplant ERISA's remedies for claims relating to employee benefit plans. Under the second test, this Court concluded that ERISA preempts all state law causes of action that conflict with ERISA's exclusive remedies for claims under an employee benefit plan. *Id.* at 51-52. Petitioner does

not contest the propriety of the *Pilot Life* test, only its application by the court below.[1]

The decision of the court below is consistent with the decisions of all the federal and state appeals courts that have considered the scope of ERISA preemption under the *Pilot Life* decision. Petitioner seeks review by this Court because he is not satisfied with the consistent application of the *Pilot Life* ruling by all the appellate courts.

A number of courts have previously ruled on the issue of ERISA preemption of California Insurance Code section 790.03(h). The California Supreme Court specifically ruled that ERISA preempts causes of action asserted under section 790.03(h) for improper claims procedures regarding an employee benefit plan. *Commercial Life Insurance Co. v. Superior Court,* 47 Cal. 3d 473, 484 (1988), *cert. denied sub nom. Juliano v. Commercial Life Insurance Co.*, 57 U.S.L.W. 3753 (U.S. May 15, 1989) (No. 88-1530).

The United States Court of Appeals for the Ninth Circuit similarly ruled that private causes of action under section 790.03(h) are preempted by ERISA. *Kanne v. Connecticut General Life Insurance Co.*, 867 F.2d 489 (9th Cir. 1989), *cert. denied*, 57 U.S.L.W. ____ (U.S. June 26, 1989) (No. 88-1659); *Roberson v. Equitable Life Assurance Society*, 869 F.2d 1498 (9th Cir. 1989), *aff'g without op.*, 661 F. Supp. 416 (C.D. Cal. 1987). Thus, the California Court of Appeal

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[1] The California Court of Appeal applied the two-part *Pilot Life* test to hold petitioner's claims were preempted by ERISA. Although the court below suggested that California Insurance Code section 790.03 is a state law directly aimed at the insurance industry (under the first part of the test), the court found that the section supplemented the exclusive remedies available under ERISA. Thus, the court below held that ERISA preempted petitioner's claims under section 790.03(h).

decision in this case is consistent with the holdings of the California Supreme Court and the Ninth Circuit Court of Appeal.

Several other courts have had an opportunity to apply this Court's decision in *Pilot Life* to preemption issues under ERISA, including several circuit courts of appeal. Every court that considered the question since *Pilot Life* has reached the same conclusion: ERISA preempts all state law claims, whether asserted under state common law or state statutory law. *E.g., Amos v. Blue Cross-Blue Shield of Alabama*, 868 F.2d 430, 431 (11th Cir. 1989) (ruling that "ERISA . . . is . . . a barrier to state law causes of action, the effect of which completely displaces state law claims"); *Sampson v. Mutual Benefit Life Insurance Co.*, 863 F.2d 108, 110 (1st Cir. 1988) (ruling that ERISA preempts similar Massachusetts law); *In re Life Insurance Co. of North America*, 857 F.2d 1190, 1194 (8th Cir. 1988) (dismissing state common law claims and a claim under a Missouri statute that prohibited a "vexatious refusal to pay" insurance benefits); *Anschultz v. Connecticut General Life Insurance Co.*, 850 F.2d 1467 (11th Cir. 1988) (finding that Florida common law and statutory causes of action for improper claims processing are preempted by ERISA).

Similarly, in those states that have considered the issue of ERISA preemption, courts of final appeal have all ruled that ERISA preempts state causes of action arising out of the processing of insurance claims of ERISA programs. *E.g., Hood v. Prudential Insurance Co.*, 522 So. 2d 265 (Ala. 1988) (holding that ERISA preempts Alabama claims for bad faith refusal to pay an insurance claim); *Desmarais v. Joy Manufacturing Co.*, 130 N.H. 299, 538 A.2d 1218 (1988) (ruling that ERISA preempts claims under New Hampshire common law). Therefore, the California Court of Appeal

decision in this case is consistent with the decisions of all these other state and federal court decisions.

The consistency of the decisions indicates that a grant of certiorari and review of this case would serve little purpose. This Court's decision concerning ERISA preemption, as set forth in *Pilot Life*, provides clear guidance to the lower courts. The clarity of this guidance is attested to by the consistency among the federal and state courts in applying the holding in *Pilot Life*. As the Eighth Circuit stated in *In re Life Insurance Co. of North America*, 857 F.2d at 1194, "[t]he Court in *Pilot Life* could not have stated with any greater clarity that the remedies afforded under ERISA are exclusive, and no state law purporting to supply additional remedies will escape the preemptive effect of § 1144(a) as laws 'which regulate insurance' under [ERISA]." Absent the need to clarify or resolve a conflict, this Court should not grant certiorari. *See Hoo v. United States*, 108 S. Ct. 742 (1988) (White, J., dissenting).

2. *There Is No Conflict Among the Circuits or State Courts Concerning the Elements of an ERISA Plan.*

An employee health care program funded through the employer's purchase of insurance is an employee benefit plan within the meaning of ERISA. Congress specifically provided that employee benefit plans may be funded "through the purchase of insurance . . . ." 29 U.S.C. § 1002, subd. (1). In this Court's recent decision in *Pilot Life*, there was apparently no dispute that the employee medical program funded through the purchase of insurance was an ERISA plan.

Contrary to petitioner's suggestion, guidance is not needed from this Court regarding the elements necessary for the establishment of an ERISA plan. This Court recently discussed the guidelines for determining the existence of an ERISA plan in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1

(1987). In *Fort Halifax*, the Court recognized that Congress intended ERISA to provide financial coordination and control when employees and their beneficiaries are dependent on the employer's fiscal responsibility, such as when an employer faces periodic demands on its assets by assuming the responsibility to make regular payments on behalf of the program. *Id.* at 9. Employers who establish medical programs for their employees face such periodic demands on their assets whether they self-insure or fund the programs through the purchase of insurance.

In this case the California Court of Appeal followed the standards announced by this Court, as well as the guidelines set forth in detail in the act itself and the regulations thereunder. 29 U.S.C. §§ 1002(1), 1003(a); 29 C.F.R. § 2510.3-1(j). The decision is supported by established case precedent. *See Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489, 492-93 (9th Cir. 1989), *cert. denied*, 57 U.S.L.W. ____ (U.S. June 26, 1989) (No. 88-1659); *Credit Managers Ass'n v. Kennesaw Life & Acc. Ins.*, 809 F.2d 617, 625 (9th Cir. 1987); *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982). These cases provide that an employer may establish an ERISA employee benefit plan through the purchase of insurance, so long as the employer is more than a mere advertiser or endorser of group insurance. In *Credit Manager*'s, the United States Court of Appeal for the Ninth Circuit stated:

> An employer . . . can establish an ERISA plan rather easily. Even if an employer does no more than arrange for a "group-type insurance program," it can establish an ERISA plan, unless it is a mere advertiser who makes no contributions on behalf of its employees.

Credit Managers Ass'n v. Kennesaw Life & Acc. Ins., 809 F.2d at 625.

Unsatisfied with the California Court of Appeal's application of established guidelines to the facts of this case, petitioner asks this Court to add to ERISA's statutory framework, a requirement that an insurance policy purchased for an ERISA plan disclose that the policy is purchased under ERISA. Petitioner's suggestion is without case or statutory support.

Petitioner's authorities are not in conflict with the decision of the California Court of Appeal and are distinguishable on their facts.[2] In *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 567 F.2d 692 (7th Cir. 1977), the United States Court of Appeals for the Seventh Circuit held that the employer had not established or maintained an ERISA plan because the employer had no knowledge of the alleged health insurance coverage arranged by an insurance and health plan brokerage company. Similarly, *Taggart Corp. v. Life & Health Benefits Administration*, 617 F.2d 1208 (5th Cir. 1980), *cert. denied sub nom. Taggart Corp. v. Efros*, 405 U.S. 1030 (1981) is factually distinguishable from this case. In *Taggart*, the United States Court of Appeals for the Fifth Circuit ruled that insurance purchased by an insurance mutual fund acting on behalf of a number of employers did not constitute an ERISA plan because the organization that established and maintained the program was neither an employer nor an employee organization. *Id.* at 1210.

Thus, the *Wayne* and *Taggart* courts based their holdings on the employers' lack of involvement, not on the plans being

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[2] The California Supreme Court has decertified one case upon which petitioner relies, *Sayble v. Blue Cross of Southern California*, 208 Cal. App. 3d 1108 (1989), *op. decertified*, ____ Cal. 3d ____, 89 Los Angeles Daily Journal D.A.R. 7398 (June 8, 1989), ordering that the reporter not publish the opinion in the official reports.

funded through the purchase of insurance. Accordingly, these decisions do not conflict with the decision of the court below that petitioner's employer had established and maintained an employee benefit plan through the purchase of group health insurance.

Therefore, the California Court of Appeal decision in this case is consistent with ERISA's statutory framework, with prior decisions of this Court, and with all other reported decisions regarding the elements of an ERISA plan. Accordingly, a grant of certiorari and review of this case is unnecessary and would serve little purpose.

3. *The Decision Has Little Impact on Future Claims.*

Certiorari is inappropriate here because the decision in this case will have minimal impact. This case concerns the preemption of a private right of action under California Insurance Code section 790.03(h). The California Supreme Court has recently ruled that section 790.03(h) does not provide a private right of action. *Moradi-Shalal v. Fireman's Fund Insurance Cos.*, 46 Cal. 3d 287, 292, 305 (1988). In *Moradi-Shalal*, the court overruled earlier precedent to abolish any private right of action under California Insurance Code section 790.03(h) for all claims filed after the date the decision became final.

As a result of the California Supreme Court's decision in *Moradi-Shalal*, the issue of preemption of California Insurance Code section 790.03(h) is now moot for all future claims. Accordingly, a decision by this Court would have limited precedential value, affecting only a relatively few cases filed before the *Moradi-Shalal* decision. Such limited precedential value provides further reason why this Court should deny petitioner's petition for writ of certiorari. *See Coleman v. Balkcom*, 451 U.S. 949, 956 (1981) (Rehnquist, J., dissenting).

4. *This Identical Issue Was Twice Recently Denied Review by Petition for Certiorari.*

In December 1988, the California Supreme Court ruled that ERISA preempts a private cause of action brought under California Insurance Code section 790.03(h) where the action asserts a claim arising from an employee benefit plan. On May 15, 1989, this Court denied certiorari in that case. *Commercial Life Insurance Co. v. Superior Court*, 47 Cal. 3d 473 (1988), *cert denied sub nom. Juliano v. Commercial Life Insurance Co.*, 57 U.S.L.W. 3753 (U.S. May 15, 1989) (No. 88-1530).

In February 1989, the United States Court of Appeals for the Ninth Circuit similarly ruled that ERISA preempts claims relating to employee benefit plans, including causes of action brought under California Insurance Code section 790.03(h). This Court recently denied certiorari in that case. *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), *cert. denied*, 57 U.S.L.W. ____ (U.S. June 26, 1989) (No. 88-1659).

CONCLUSION

No amount of rhetoric can transform this case into one justifying review by this Court. The decision of the California Court of Appeal is consistent with ERISA's statutory framework, with prior decisions of this Court, and with all other reported decisions regarding ERISA preemption and the elements of an ERISA plan. There is no important question of constitutional law or public policy requiring review by this

Court. Therefore, respondent respectfully requests that the petition for a writ of certiorari be denied.

Dated: June 30, 1989

Respectfully submitted,

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